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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 184

MAURICE M. FILISTER AND J. J. BLISS

Appellants

vs.

CITY OF MINNEAPOLIS AND WILLIAM H. BORGERT, FLORENCE H. BORGERT, HAROLD G. BROTHERS, SALLY BROTHERS, JACK A. ISAAMAN AND IVY ISAAMAN

Appellees

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JOINT MOTION TO DISMISS APPEAL

ARVID FALK*
Assistant City Attorney
333 City Hall
Minneapolis, Minnesota 55415
KEITH M. STIDD
City Attorney
D. J. SHAMA
Assistant City Attorney
Attorneys for Respondent, City of Minneapolis
KENNETH W. GREEN*
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
JOHN R. GOETZ AND FREDERICK W. THOMAS
Attorneys for Respondents William H. Borgert, Florence B. Borgert, Harold G. Brothers, Sally Brothers, Jack A. Isaaman and Ivy Isaaman

*Counsel of Record

Supreme Court Brief Prtg. Co., Minn., Minn. 55415

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The appellees jointly move the court to dismiss the appeal from the judgment of the Supreme Court of Minnesota on the ground that it does not present a substantial federal question and on the ground that the judgment rests on an adequate non-federal basis.

SUMMARY OF THE CASE

In issue is the validity of the comprehensive zoning ordinance of the City of Minneapolis as applied to approximately eight acres of unimproved land located in that city.

Ever since 1924, and long before the acquisition of any interest in the land by either of the appellants, the use of the land was restricted by the applicable zoning ordinance to single-family detached dwellings and certain other non-commercial uses excluding apartment buildings. Appellants claimed that the cost of putting the land in suitable condition for the erection of single-family homes would exceed the market value of the land after being put in such condition, and that therefore the ordinance as applied to the land in question is confiscatory in violation of the Fourteenth Amendment as well as the Constitution of the State of Minnesota.

Appellees Borgert et al., neighboring landowners, intervened in the action brought by appellants against the City of Minneapolis, seeking to protect their interest in preserving the residential character which the neighborhood had always possessed.

Appellant Bliss, who bought the property at a tax sale for $3,800 (R. p. 139, f. 3) was aware of the physical condition of the property when he acquired it (R. p. 143, f. 2). Appellant Filister holds only an option to purchase the land, which he is not obligated to exercise, and therefore has no interest in it (R. p. 1, f. 3).

After a trial without a jury the trial court found that the market value of the land after the improvements necessary to bring the land into condition for building would exceed the cost of such improvements (R. p. 29, f. 3). It found that "the development of the [appellant's] property into lots reasonably comparable to other lots in this area by such piling and fill is reasonably economically feasible" (R. p. 29, f. 1).

The Supreme Court of Minnesota affirmed the trial court's findings, holding that there was evidence to support

the court's conclusions. (Jurisdictional Statement, Appendix A, p. 17.)

The Minnesota Supreme Court also held that the principles of estoppel and laches were applicable to the conduct of appellant Bliss and his predecessors in interest, that therefore appellants had the burden of proving by clear and convincing evidence that the relief they sought would not result in any substantial detriment to neighboring property improved in reliance on the validity of the ordinance, and that they had not sustained this burden. (Jurisdictional Statement, Appendix A, p. 22.)

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The constitutionality of the Minneapolis Zoning Ordinance is not challenged in this appeal, but only the constitutionality of its application to a small parcel of land acquired long after the zoning existed.

In arriving at their decisions both the trial court and the Supreme Court of Minnesota balanced the claimed right of one landowner against the vested rights of surrounding landowners. Private property rights on one side were weighed against those on the other. Weighing the evidence, the trial court decided that the appellants had failed to prove confiscation and the Supreme Court affirmed its findings; no essentially federal question is presented in this situation.

In an attempt to arrive at a federal question appellants ask this Court to find that both the trial court and the Supreme Court of Minnesota were wrong in deciding that there was evidence to support the conclusion that the market value of the land would be greater after improvement

than the cost of such improvement. Yet the record clearly shows that the trial court and the Supreme Court were right with respect to costs of improvement (R. p. 326, f. 3; R. p. 327, f. 1) and as to the probable market value of the land after being brought to normal condition (R. p. 250, f. 3; Defendant Intervenors' Exhibit 3; R. p. 307, f. 1; R. p. 375, f. 1. See also the opinion of the Supreme Court, Jurisdictional Statement, Appendix A, p. 17.) Only an issue of quantum of proof is presented here and this does not involve any federal question.

That no federal issue is actually present is made all the clearer by the fact that no recent action of any kind by the City of Minneapolis is complained of. The land has been zoned in its present manner since 1924, and the city has since that time done nothing to diminish its value. Appellant Bliss, fully aware of its physical condition, bought the land when it was zoned as it is presently zoned, and neither the city nor anyone else has taken from him anything that he ever possessed.

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In addition to holding that the evidence supported the trial court's findings with respect to cost of improvement and subsequent market value, the Minnesota Supreme Court held that the interests of neighboring landowners must be weighed against those of the appellants (which principle is implicit in the recognition of the right of such landowners to intervene in the litigation) and that, because of their laches and those of their predecessors in interest, appellants had the burden, which they had not sustained, of proving that no substantial detriment to neighboring

property, improved in reliance on the validity of the zoning ordinance, would result from the erection of apartment buildings.

Appellants properly concede that laches or estoppel is a "non-federal issue" (Jurisdictional Statement, p. 4, Paragraph 5), but argue that the Supreme Court should not have considered this issue because it had not been raised in the lower court and also argue that the doctrine of laches and estoppel has no application with respect to an ordinance claimed to be invalid by reason of the Fourteenth Amendment. Both arguments are unsound.

In Paragraph III of its answer to the complaint, the City of Minneapolis pleaded as follows (R. pp. 7-8):

> "Alleges that if the plaintiff acquired any interest in the above property, he knew or he should have known that at all times said property was classified as a residence district under the ordinance of April 3, 1924 and as an R-1 district under the new comprehensive zoning ordinance, and that any interest acquired by plaintiff was subject to the provisions of the above mentioned ordinance and valid and effective against the plaintiff."

The intervenors' answer contained a substantially similar averment (R. p. 13). As noted above, the very appearance of the intervenors in the litigation was justified by their reliance as property owners on the zoning ordinance under attack.

Reliance and laches were proved in the trial court (R. p. 159, ff. 2, 3; R. p. 165, f. 3; R. p. 178, f. 2;* R. p.180, f. 1; testimony of Mrs. Smith, R. pp. 184-185).

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*Witness "Because we built that home there for having our own homes. It was a district for all homes in there when I built it and that was fourteen years ago; there was not supposed to be any apartments in that place."

And in its memorandum forming part of its order the trial court stated:

> "It seems to the Court also that the rights of surrounding property owners who apparently have relied on such zoning provisions over a long period of time must also be included in the Court's interpretation of the validity of a zoning ordinance." (R. p. 46, f. 2.)

No constitutional right of the appellants is involved in this case, and if they possessed any such right it was lost by failure of themselves and their predecessors in interest to make a timely assertion of it. The applicability of laches to the assertion of constitutional rights has been recognized by other state courts. In *Fifth Church of Christ Scientist in Denver v. W. F. Pigg & Son,* 109 Colo. 103, 122 P. 2d 887, the court stated:

> "It thus appears that for approximately fourteen years the owners of the property here involved had entirely acquiesced in its zoning classification while others made large investments relying thereon which would now be materially depreciated by the proposed elimination of the status quo."

In *Wilson v. School District of Philadelphia,* 328 Pa. 225, 244, 195 Atl. 90, 100, the Supreme Court of Pennsylvania declared:

> "No principle has become more firmly established in the field of constitutional law than the fact that a person may effectively by acts or omission waive a consitutional right to the protection of which he would otherwise be entitled, provided the waiver does not run counter to public policy or public morals. This is nothing more than the equitable doctrine of estoppel applied in the realm of constitutional law and is uni-

formly upheld in cases where the constitutional provision is solely protective of property rights."

The principle stated in these cases, which is dispositive of the motion to dismiss, was recognized by this Court in *Pierce v. Somerset Railway,* 171 U. S. 641, 648, 19 S. Ct. 84, 43 L. Ed. 316 as follows:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

Respectfully submitted,

ARVID FALK*
Assistant City Attorney
333 City Hall
Minneapolis, Minnesota 55415
KEITH M. STIDD
City Attorney
D. J. SHAMA
Assistant City Attorney
Attorneys for Respondent, City of Minneapolis
KENNETH W. GREEN*
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
JOHN R. GOETZ AND FREDERICK W. THOMAS
Attorneys for Respondents William H. Borgert, Florence B. Borgert, Harold G. Brothers, Sally Brothers, Jack A. Isaaman and Ivy Isaaman

*Counsel of Record